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Serrano v. Four Season Framing Respondent's Brief Dckt. 40970

IN THE SUPREME COURT FOR THE STATE OF IDAHO

FRANSISCO SERRANO, Claimant/Appellant, vs. FOUR SEASONS FRAMING, Employer, and LIBERTY NORTHWEST INSURANCE CORP., Surety, Defendants/Respondents.	Supreme Court No. 40970-2013 **RESPONSIVE BRIEF OF DEFENDANT/RESPONDENTS FOUR SEASONS FRAMING and LIBERTY NORTHWEST INSURANCE CORP.**

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APPEAL FROM THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

THOMAS E. LIMBAUGH, CHAIRMAN

Kent W. Day, ISB #4273
LAW OFFICES OF KENT W. DAY
P.O. Box 6358
Boise, ID 83707-6358
Attorney for Defendants/Respondents FOUR SEASONS FRAMING and LIBERTYNORTHWEST INSURANCE CORP.

Richard L. Hammond
Attorney at Law
811 E. Chicago Street
Caldwell, ID 83605
Attorney for Claimant/Appellant FRANCISCO SERRANO

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STATEMENT OF THE CASE

I. Nature of the Case

Claimant/Appellant, Francisco Serrano ("Claimant"), is represented by Richard Hammond of Caldwell, Idaho. Respondents/Defendants, Four Seasons Framing ("Employer"), and Liberty Northwest Insurance Corporation ("Surety"), are represented by Kent W. Day of Boise, Idaho.

This matter was heard on July 28, 2011, before the Industrial Commission of the State of Idaho ("Commission"), sitting *en banc*. A post-hearing deposition of Dr. Timothy Doerr was undertaken by Defendants on December 21, 2011. A.R. Vol. II, p. 312. The Commission issued Findings of Fact, Conclusions of Law and Recommendations ("Decision"), dated March 20, 2013. *A.R. Vol. II, p. 310-342.* The Commission received Claimant's Notice of Appeal filed April 30, 2013 and Claimant's Amended Notice of Appeal filed July 17, 2013. *A.R. Vol. II, p. 343-347.*

II. Course of Proceedings Below

Claimant filed Worker's Compensation Complaints alleging two industrial separate industrial accidents. Claimant filed his first Complaint on December 23, 2008, for an industrial injury sustained on January 13, 2004. As of January 22, 2009, the date Defendants filed their Answer to Claimant's Complaint for the 2004 injury, Surety had paid out $7,810.26 in TTD benefits and $32,486.84 in medical benefits on Claimant's behalf for the January 16, 2004 injury. *A.R. Vol. I, p. 1-5.* Claimant's second Complaint was filed on July 27, 2011, for an industrial injury sustained on January 28, 2008.[1] As of

[1] Just ONE day prior to hearing on Claimant's 2004 injury, Claimant filed his complaint for his January 28, 2008, injury. Defendants reasonably could have objected to consideration of the 2008 claim at hearing, however, in the interest of judicial economy, Defendants agreed to the inclusion of the 2008 claim.

July 28, 2011, Surety had paid $9,213.80 in TTD benefits and $18,175.70 in medical benefits on Claimant's behalf for his 2008 injury. *A.R. Vol. II, p. 285.* Claimant's Complaints were consolidated by Order of the Commission dated August 2, 2011. *A.R. Vol. II, p. 286.*

The Commission conducted a hearing July 28, 2011. *A.R. Vol. II, p. 310.* **By agreement of the parties at hearing, the issues to be decided were:**

A. Claimant's entitlement to additional temporary partial or temporary total disability benefits (TPD/TTD);

B. Claimant's entitlement to additional medical care benefits pursuant to Idaho Code § 72-432;

C. Claimant's entitlement to permanent partial impairment benefits (PPI); and

D. Claimant's entitlement to attorney fees pursuant to Idaho Code § 72-804.

*A.R. Vol. II, p. 311(*emphasis added). The post-hearing deposition of Timothy E, Doerr, M.D., was undertaken by Defendants on December 1, 2011. *A.R. Vol. I, p. 24.* The parties submitted post-hearing briefs and the Commission took the matter under advisement on July 26, 2012. *A.R. Vol. II, p. 310.* Upon the record introduced at hearing, the post-hearing deposition testimony of Timothy E. Doerr, M.D., and the post-hearing briefing submitted by the parties, the Commission issued its Decision, dated March 20, 2013. *A.R. Vol. II, p. 310-342.* The Commission specifically found that, as a matter of fact, Claimant failed to prove that the condition for which he claimed benefits was caused by either his 2004 or 2008 industrial accident. All other issues were rendered moot. *A.R. Vol. II, p. 340-341.* Claimant filed his Notice of Appeal on April 30, 2013. *A.R. Vol. II, p. 343-347.*

III. Statement of Facts

A. The January 16, 2004, Industrial Accident

Claimant began working for Employer as a framer on September 10, 2001. He worked 40-45 hours per week. On January 16, 2004, Claimant was working on a roof at a construction site when he fell to the ground from a height of approximately fifteen feet, landing on his side. Claimant did not hit his head when he fell, nor did he lose consciousness, and was able to ambulate after his fall. He was transported by private vehicle to St. Luke's Regional Medical Center Emergency Department in Boise, where he reported pain in his hips and on the right side of his body. A CT scan revealed transverse process fractures at L2 and L3 and a mildly displace left inferior pubic ramus fracture. Claimant was then transferred by ambulance to St. Alphonsus Regional Medical Center ("SARMC"), for surgical consultation and was admitted for observation and pain control by Scott Henson, M.D. Dr. Henson consulted with Dr. Timothy Doerr, M.D., a spinal surgeon, about Claimant's transverse process fractures and was informed that no surgical intervention was necessary. Dr. Henson next consulted with Dr. James Johnston, M.D., an orthopedic surgeon, for Claimant's pelvic injury. Dr. Johnston determined that Claimant's pelvic injury did not require surgery, and could be managed with weight bearing as tolerated and temporary work restrictions. Claimant was discharged from the hospital on January 17, 2004, with instructions to see Dr. Johnston for follow-up on January 22, 2004.

Claimant presented to Dr. Johnston on January 22, complaining of pelvic pain and significant right shoulder pain, especially with overhead activities. Upon physical

examination, Dr. Johnston noted *trace tenderness of the lumbar spine* on the right and positive impingement signs in Claimant's right shoulder. *Def. Exh. I, p. 67,* (emphasis added*)*. Dr. Johnston diagnosed traumatic onset impingement syndrome, noting that if the pain persisted he would order shoulder x-rays and possible a subacromial steroid injection.

At re-check on February 12, 2004, Claimant's major complaints were shoulder and rib pain, but he also reported numerous other symptoms, including mild to moderate low back pain. During examination, Dr. Johnston observed a mild lumbar spasm, rib tenderness, and positive impingement findings on the right shoulder. Shoulder x-rays were obtained which revealed a Type II-III acromion, consistent with impingement syndrome. Claimant's lumbar pain was attributed to his transverse process fractures and the left groin pain from the pelvic fracture, both of which were predicted to resolve uneventfully. *Id., p. 69.* Claimant's right shoulder subacromial space was injected with Betamethasone/Marcaine and follow-up was scheduled in two weeks. On February 26, 2004, Claimant informed Dr. Johnston that the shoulder injection had provided no relief and he continued to have pain in his hip and ribs and significant pain in his shoulder. No back pain was noted at this office visit. Dr. Johnston told Claimant that his hip and rib pain would resolve slowly over the course of several weeks or even months and required no treatment beyond stretching exercises. For Claimant's shoulder, Dr. Johnston recommended surgery, as he believed that Claimant's shoulder symptoms were unlikely to resolve through continued conservative treatment.

Arthroscopic decompression including acromioplasty and distal clavicle resection was performed by Dr. Johnston on March 19, 2004. At his first post-operative exam on

March 25, 2004, Dr. Johnston noted that Claimant was ready to proceed to physical therapy for both his right shoulder and his low back problems. *Id., p. 74.* Claimant's shoulder progressed well in physical therapy, but his low back pain persisted. An MRI of the lumbar spine, taken April 28, 2004, revealed the following: 1) at L4-L5, minimal posterior non-compressive annular disc bulging and disc dessication; 2) at L5-S1, degenerative disc disease, posterior annular disc bulging, central/left paramedian subligamentous disc protrusion, possible minimal impingement of the left S1 nerve root, non-compressive neural foraminal narrowing and facet arthrosis. In discussion with Claimant on May 4, 2004, Dr. Johnston interpreted the MRI to show mild degenerative changes without nerve root impingement. *Id., p. 77.* The treatment plan was to return Claimant to light duty work in a week and a half, and to full work in one month. Re-check was scheduled for one month. On May 20, 2004, Claimant presented to Dr. Johnston complaining that work was aggravating his back pain. While Dr. Johnston noted that most of Claimant's pain was probably from degenerative changes, there was a possibility of a truly symptomatic disc problem. He referred Claimant to pain specialist, Dr. Sandra Thompson, for epidural steroid injections. *Id., p. 80.*

Claimant received two epidural steroid injections from Dr. Thompson, which succeeded in alleviating Claimant's back pain. On June 28, 2004, noting that Claimant had experienced no back pain since receiving his injections, Dr. Johnston determined Claimant was medically stable with no permanent impairment. *Id., p. 83-84.*

On November 16, 2004, Claimant returned to Dr. Johnston with complaints of severe back pain. Noting concern that Claimant's "previous MRI findings of degenerative disc disease with disc bulge/herniation may have progressed," Dr.

Johnston referred Claimant to Dr. Tim Floyd for further evaluation. *Id., p. 85.*

After November 16, 2004, Claimant saw no further medical providers for his back pain. *Tr. 73, lines 13-15.* In response to Surety's May, 2005, letter, Dr. Johnston indicated Claimant's disc pathology was almost certainly pre-existing, but was also exacerbated by his fall from the roof on January 16, 2004. *Id., p. 88.* Dr. Johnston did not provide any additional information as to whether the exacerbation was temporary or permanent, but **he did not revise his finding that Claimant suffered no permanent impairment from the 2004 industrial injury.** *Def. Exh. I, p. 83-84, 88.* **Claimant was able to return to his time-of-injury position with Employer working full time without restrictions.** *A.R. Vol. I, p. 5.*

B. The January 28, 2008, Industrial Accident

On January 28, 2008, Claimant slipped and fell on ice while at work, landing on his back. Claimant did not seek any medical treatment related to the fall until, on February 4, 2008, he presented to the St. Alphonsus emergency department complaining of back pain. At that time Claimant was diagnosed with acute myofascial strain and acute onset low back pain. Medication was prescribed and Claimant was released. On February 6, 2008, Claimant sought additional medical treatment from Dr. Joseph Verska, M.D., complaining of low back pain and bilateral leg pain, numbness and tingling. Radiographs of Claimant's lumbar spine were taken, revealing an osteophyte and moderate disc space narrowing at L5-S1. Dr. Verska diagnosed sciatica, degenerative disc disease, and a herniated disc, and ordered an MRI. **The MRI taken February 21, 2008, was compared to the April, 2004, MRI.** The radiologist reported as follows: 1) minor L4-L5 degenerative changes, unchanged from

prior study; and 2) mild/moderate degenerative changes at L5-S1 with central disc herniation and minor left greater than right foraminal stenosis, **unchanged from prior study**. *Def. Exh. G, p. 60B* (emphasis added).

Claimant presented for MRI review and discussion with Dr. Verska on February 28, 2008. Dr. Verska interpreted the 2008 MRI as showing some degenerative changes at L5-S1 with a central canal herniation at L5-S1, and told Claimant he did not believe surgery was indicated. *D. E. O, p. 228.* Claimant was referred to Dr. Beth Rodgers, M.D., for epidural steroid injections at Dr. Verska's recommendation. Claimant declined to receive any injections from Dr. Rodgers, and on April 2, 2008, Dr. Verska offered Claimant a microdiscectomy at L5-S1 on the left, upon receipt of approval from Surety. *Id., p. 232.*

Dr. Verska performed a surgical consult/evaluation on April 16, 2008, ultimately determining that Claimant did not need surgery because Claimant's symptoms were not bad enough and Claimant had no motor or sensory deficits or reflex changes to indicate ongoing radiculopathy. Noting that Claimant desired to have surgical intervention, Dr. Verska opined that he did not believe Claimant would do well with the desired operation, and referred him to Dr. Timothy Doerr, M.D., for a second opinion on surgery, and to Dr. Beth Rodgers for an impairment rating. *Id., p. 234.*

Claimant saw Dr. Rogers for an impairment rating on April 21, 2008. Although the Commission later found Dr. Rogers' impairment rating of 6% attributable solely to the 2008 accident lacked credibility[2], several comments in her report are worthy of note.

[2] Dr. Rogers did not refer to the 2004 MRI in her report, and apparently based her rating on the 2008 MRI only. Thus, the Commission determined that her opinion that Claimant's disc herniation at L5-S1 was attributable only to the 2008 accident was not credible, as the disc herniation appeared on the 2004 MRI. As such, it was a pre-existing condition. *A.R. p. 330.*

Specifically, although Dr. Rogers found Claimant had a documented single-level disc protrusion at L5-S1, **she also opined that Claimant exhibited some non-verifiable or inconsistent radicular complaints, and somewhat inconsistent symptoms. His straight leg raise test was negative, and sensory findings were inconsistent.** Claimant had normal motor strength and no significant lower extremity atrophy. On initial clinical presentation Claimant documented pain in an appropriate distribution, however there were **inconsistencies on exam.** *Def. Exh. O, p. 237-238* (emphasis added).

Claimant presented to Dr. Doerr on April 22, 2008, for a second opinion on surgical intervention. Dr. Doerr noted that Claimant had a previous work injury in 2004 and was doing well until a repeat injury on January 28, 2008. Since the 2008 injury Claimant complained of back pain radiating into both legs with intermittent numbness bilaterally but no weakness, and no change in bowel/bladder function. *Def. Exh. P, p. 243.* After examining Claimant and reviewing the 2008 MRI, Dr. Doerr opined that Claimant's low back pain was most likely caused by his degenerative changes at L5-S1 greater than L4-5. Further, as Claimant exhibited no significant neurological impingement, Dr. Doerr did not advise any surgical intervention, but did recommend physical therapy in the form of a physiatry-directed rehab program with a goal of rapid reintegration into the workplace. In the event Claimant's symptoms were not controlled with formal rehabilitation, Dr. Doerr recommended re-evaluation by a spine surgeon in eight to twelve weeks. *Id.*

Thereafter, Claimant began a physical therapy regime, however returned to Dr. Doerr on June 6, 2008, reporting that the physical therapy did not relieve his pain.

Based upon Claimant's six month period of persistent symptoms despite anti-inflammatories, activity modifications and physical therapy, Dr. Doerr felt a discogram of the lumbar spine from L3 to the sacrum was warranted. *Def.Exh. P, p. 248.* Claimant underwent a discogram performed by Dr. Sandra Thompson on July 17, 2008, which was negative at L3-4 and negative at L4-5. The L5-S1 level could not be accessed. Thereafter, Dr. Doerr performed a series of two bilateral transforaminal epidural steroid injections, neither of which provided Claimant with improvement in his symptoms. Dr. Doerr then recommended a repeat discogram in an attempt to access the L5-S1 level. *Def. Exh. P, p.249-253.*

On September 8, 2008, Claimant underwent a repeat discogram at the L4-5 and L5-S1 levels, performed by Dr. William Binegar. *Def. Exh. H, p. 65K-65L.* Dr. Binegar's operative note indicates a normal pattern at level L4-5, with no pain noted during the injection and no extravasation of dye noted, therefore the interpretation by Dr. Binegar was that disk L4-5 was not contributing to Claimant's pain. However, he noted the following during the same procedure for level L5-S1:

> At this level prior to the injection of any dye Mr. Serrano began noting some pain and pressure. He indicated this persisted for some time before I even injected any dye. We talked to him some more and he finally indicated he was not having increasing pain. I then continued with the procedure, where we started again fluoroscopy and I then began the injection of dye. During the entire time of the injection he indicated minor pain and minor pressure. At no time during the injection did he indicate any significant pain. The maximum pressure I obtained was 43 psi. I did inject 3.5 cc of dye. This did reveal a degenerative pattern with a fissure noted on the right. When I informed Mr. Serrano that we finished he then indicates his pain level is now suddenly a 7/10 to 8/10. I repeated injection of dye of approximately 0.3 cc and during this repeat injection he did not indicate increased pain. The interpreter is present during this entire time of dye injection of both disks.

> At this level there really is not pain noted during the injection of dye. Only at the end of the injection of dye does Mr. Serrano indicate any pain. There is a noted right-sided fissure. I feel this discogram is indeterminate for determining if this L5-S1 disk is contributing to his pain. **I felt Mr. Serrano was somewhat unreliable in his presentation indicating pain even prior to the injection of dye at this level. Also I will state during the entire injection process he kept asking which disk we were doing, He wanted to know if it was the disc that they had trouble getting into before. He wanted to know if it was disk level 1 or disk level 2.** Again, my interpretation at this time is the L5-S1 discogram is indeterminant for determining if the L5-S1 disk is contributing to Mr. Serrano's typical low back pain."

*Def. Exh. H, p. 65K-65L (*emphasis added*).* Claimant saw Dr. Doerr on September 16, 2008, to review his discogram results. *Def. Exh. O, p. 260.* The following remarks in Dr. Doerr's chart note from that visit are enlightening:

> On examination today, he has 60 degrees forward flexion and 30 degrees extension of the lumbar spine. He has 30 degrees right side bending and 30 degrees left side bending. He has 5/5 strength bilateral iliopsoas, quadriceps, tibialis anterior, extensor halluces longus, gastrocnemius-soleus and hamstrings. Light touch is intact and symmetrical L2 to S1.
>
> Discogram of the lumbar spine from 09/08/08 was negative at L4-5 and **indeterminate at L5-S1 with the patient's responses concerning for possible nonorganic symptoms. I personally discussed the discogram results with Dr. Binegar who performed the discogram, who was in agreement that it is unlikely that L4-5 and L5-S1 is contributing to any of Francisco's symptoms.**
>
> At this point Francisco has gone through one month (Dr. Doerr acknowledged during his deposition that this was a clerical mistake in the chart note and that it should have said "eight months") of conservative treatment including anti-inflammatories, activity modification, physical therapy, bilateral L5 transforaminal epidural steroid injection x2. His discogram reveals no definitive discogenic source for his symptoms. At this point I believe that he is at maximum medical improvement. I do not see any objective evidence to support any work restrictions at this time. He has 0 percent permanent partial impairment.

Def. Exh. P, p. 260 (emphasis added). See also, Doerr Depo, p. 13, lines 9-12.

Following this appointment, Surety ceased paying benefits on Claimant's 2008 claim.

On October 5, 2008, Claimant suffered pain when he felt a pop in his back and fell to the floor after attempting to rise from a couch. He was transported by ambulance to St. Alphonsus emergency department. An MRI was performed, revealing mild L4-L5 disc dessication with no central canal or foraminal stenosis, and mild disc bulging at L5-S1 with no central canal or foraminal stenosis. The interpreting radiologist did not compare it to either the 2004 MRI or the 2008 MRI. The treating ER physician opined that Claimant's pain seemed to be related to lumbar disc disease. Def. Exh. F, p. 48K. Claimant was admitted to the hospital for pain control and received treatment from Dr. Kenneth Little, M.D. An evaluation found no acute injury and Claimant was released to follow up with Dr. Thompson for pain management. During 2009 and 2010 Dr. Thompson treated Claimant with pain medications, ultimately referring Claimant to Dr. Michael Hajjar, M.D., for consultation. *Def. Exh. Q, p. 262-286.* Dr. Hajjar opined that Claimant might be a potential candidate for further lumbar treatment or intervention, but wanted new studies done to determine appropriate treatment. Claimant did not follow up with Dr. Hajjar due to financial issues. *A.R. Vol. II, p. 334-335.*

After the 2008 accident, Claimant ceased working for Four Seasons Framing. Claimant began working as a landscaper in 2009, continuing to do so at the time of hearing. *Tr., p. 54, lines 4-13, p. 55, lines 1-5.*

This matter was heard on July 28, 2011, before the Industrial Commission of the State of Idaho ("Commission"), sitting *en banc.* A post-hearing deposition of Dr. Timothy Doerr was undertaken by Defendants on December 21, 2011. *A.R. Vol. II, p. 312.*

The case was taken under advisement by the Commission on July 26, 2012. After thorough consideration of the testimonial and documentary evidence in the record, as well

as the briefs of the parties, the Commission held that Claimant failed to prove that the condition for which he claimed benefits was caused either by his 2004 industrial accident or his 2008 industrial accident. Because he failed to prove causation, he failed to prove entitlement to additional benefits. Having failed to show entitlement to additional benefits, he also failed to show that Defendants unreasonably denied or delayed payment of benefits. Therefore, Claimant was not entitled to attorney fees. Other issues were deemed moot. *A.R. Vol. II, p. 340-341.*

Claimant timely filed his Notice of Appeal under I.C. §72-1368(9) and I.A.R 14(b) on April 30, 2013, alleging six (6) issues to be decided on appeal. *A.R. Vol. II, p.343-347.* The Industrial Commission filed a Notice of Completion of Agency Record (and mailing to the parties) on May 24, 2013. *A.R. Vol. II, p. 352-353.* On June 18, 2013, Claimant then filed his Objection And Motion To Augment The Agency Record under I.A.R. 28 and 29(a). *A.R. Vol. III, p. 354-357.* On July 8, 2013, the Industrial Commission filed its Order Regarding Claimant's Request To Augment The Agency Record, and its Order Settling Record. *A.R. Vol. III, p. 358-369.*

Claimant next filed an Amended Notice of Appeal on July 17, 2013, alleging seven (7) issues to be decided on appeal. On July 23, 2013, Defendants filed a Motion To Limit Issues and Brief In Support contending the Court should limit the issues to be heard to issues "1(c) through (g)" as set forth in Claimant's Amended Notice of Appeal. Claimant filed his Brief in Opposition of Defendants' Motion on July 31, 2013. Claimant next filed a Motion For Permission To Exceed 50 Pages and to Extend Briefing Schedule on September 20, 2013. Defendants filed a Motion To Extend Briefing Schedule And

Response To Claimant's Motion For Permission To Exceed 50 Pages on September 25, 2013.

IV. Issues on Appeal

A. Whether the Commission committed legal error or abused its discretion by denying Claimant's Motion for Protective Order on February 23, 2010, Claimant's Motion for Reconsideration on December 21, 2010, or Claimant's Renewed Motion for Protective Order, Motion for Reconsideration and Sanctions on February 24, 2011

B. Whether the Commission committed legal error or abused its discretion by striking Claimant's claim for disability benefits as a sanction for Claimant's refusal to provide Defendants with a response to relevant discovery intended to ascertain Claimant's immigration status in its Order dated September 7, 2010

C. Whether the Commission committed legal error or abused its discretion by admitting into evidence and considering the testimony and deposition of Dr. Timothy Doerr over Claimant's objections

D. Whether, upon the record in its entirety, there is substantial and competent evidence to support the Commission's factual determination that Claimant failed to prove that the condition for which he claimed benefits was caused either by his 2004 or 2008 industrial accident and therefore was not entitled to further medical or indemnity benefits or attorney fees

E. Whether the Commission committed legal error or abused its discretion by issuing its July 8, 2013 Order Regarding Claimant's Request to Augment the Record

F. Whether to grant Claimant's request for an award of attorney fees under I.C. §72-804, I.A.R. 11.2, or I.R.C.P. 11(a)(1)

G. Whether to grant Defendants' request for an award of costs on appeal under I.C. §12-121 and/or I.A.R. 41

ARGUMENT

I. RELEVANT LAW

A. BURDEN OF PROOF/CAUSATION

It is well-settled law the claimant in a workers compensation case has the burden of proving, by a preponderance of the evidence, that he is entitled to benefits. *Evans v. Hara's, Inc.,* 123 Idaho 473, 479, 849 P.2d 934, 940 (1993). The Claimant must prove not only that he was injured, but also that his injury was the result of an accident arising out of and in the course of his employment. *Neufeld v. Browning Ferris Industries*, 109 Idaho 899, 902, 712 P.2d 600, 603 (1985); *see also Cole v. Stokely Van Camp*, 118 Idaho 173, 175, 795 P.2d 872, 874 (1990), *Dinius v. Loving Care and More, Inc.*, 133 Idaho 572, 990 P.2d 738 (1999), *and Reinstein v. McGregor Land & Livestock*, 126 Idaho 156, 158, 879 P.2d 1089, 1091 (1994).

The proof presented by a claimant must establish a probable – not merely a possible – connection, or causal link, between cause and effect to support the contention he suffered a compensable accident. *Callantine v. Blue Ribbon Linen Supply*, 103 Idaho 734, 735, 653 P.2d 455, 456 (1982); *Beardsley v. Idaho Forest Industries*, 127 Idaho 404, 406, 901 P.2d 511, 513 (1995). "Probable" is defined as "having more evidence for than against." *Fisher v. Bunker Hill Co.*, 96 Idaho 341, 344, 528 P.2d 903, 906 (1974). A claimant also must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability. *Langley v. State of Idaho Industrial Special Indemnity Fund*, 126 Idaho 781, 785, 890 P.

2d 732, 736 (1995). An employer is not liable for medical treatment that is not causally related to an industrial accident. *Sweeney v. Great West Transp.,* 110 Idaho 67,71, 714 P.2d 36, 40 (1986); *Williamson v. Whitman Corp./Pet, Inc.* 130 Idaho 602, 944 P.2d 1365 (1997); *Matthew v. Dept. of Corrections,* 121 Idaho 680, 827 P.2d 693 (1992).

B. EVIDENTIARY RULINGS

Strict adherence to the rules of evidence **is not** required in Industrial Commission proceedings and admission of evidence in such proceedings is more relaxed. *Stolle v. Bennett,* 144 Idaho 44, 49, 156 P.3d 545, 550 (2007) (*citing Hagler v. Micron Technology, Inc.,* 118 Idaho 596, 598, 798 P.2d 55, 57 (1990) (*emphasis in original*)). When the Legislature created the Commission, it intended that proceedings before it be as "summary, economical, and simple as the rules of equity would allow." *Stolle, 144 Idaho at 50, 156 P.3d at 551 (citing Hite v. Kulhenak Bldg. Contractor,* 96 Idaho 70, 72, 524 P.2d 531, 533 (1974)). The Commission should have the discretionary power to consider any type of reliable evidence having probative value, even though that evidence may not be admissible in a court of law. *Stolle v. Bennett, supra.*

II. STANDARD OF REVIEW

A. FACTUAL DETERMINATIONS

In reviewing decisions of the Industrial Commission on appeal to the Idaho Supreme Court, Idaho Code §72-732 sets forth the standard of review:

> DISPOSITION OF APPEAL – JURISDICTION OF SUPREME COURT. Upon hearing the court may affirm or set aside such order or award, or may set it aside only upon any of the following grounds:
>
> (1) The commission's findings of fact are not based on any substantial competent evidence;

(2) The commission has acted without jurisdiction or in excess of its powers;

(3) The findings of fact, order or award were procured by fraud;

(4) The findings of fact do not as a matter of law support the order or award.

I.C. §72-732. In other words, "[t]he Commission has wide discretion in making factual determinations regarding worker's compensation claims." *Magee v. Thompson Creek Mining Company,* 152 Idaho 196, 200, 268 P.3d 464, 468 (2012) (*quoting Mulder v. Liberty Nw. Ins. Co.,* 135 Idaho 52, 55, 14 P.3d 372, 375 (2000)). The Court will not disturb the Commission's findings of fact unless they are clearly erroneous and not supported by substantial and competent evidence. *Magee v. Thompson Creek Min.Co.,* 152 Idaho at 201, 268 P.3d at 469 (*citing Ewins v. Allied Sec.,* 138 Idaho 343, 346, 63 P.3d 472 (2003)). Nevertheless, the Court exercises free review over the Commission's legal conclusions. *Id.*

B. EVIDENTIARY RULINGS

The Court reviews challenges to a trial court's evidentiary rulings under the abuse of discretion standard. *Perry v. Magic Valley Regional Medical Center*, 134 Idaho 46, 50, 995 P.2d 816, 820 (2000) (*citing Kozlowski v. Rush*, 121 Idaho 825, 827, 828 P.2d 854, 856 (1992)). These include trial court decisions admitting or excluding expert witness testimony. *Id.* (*citing Morris By and Through Morris v. Thomson*, 130 Idaho 138, 144, 937 P.2d 1212, 1218 (1997)). When reviewing a lower court or agency's discretionary decision, this Court must conduct a three-part inquiry to determine whether the lower court or agency abused its discretion. A trial court does not abuse its discretion if it (1) correctly perceives the issue as discretionary, (2) acts within the bounds of discretion and applied

the correct legal standards, and (3) reaches the decision through an exercise of reason. *Magee v. Thompson Creek Min.Co.,* 152 Idaho 196, 200, 268 P.3d 464, 468 (2012) (*citing West Wood Invs., Inc., v. Acord*, 141 Idaho 75, 82, 106 P.3d 401, 408 (2005)).

C. CREDIBILITY OF CLAIMANT

When the Industrial Commission is presented with conflicting testimony at hearing, it is incumbent upon the Industrial Commission to determine the credibility of the witnesses to determine which testimony is to believed.

> The rule applicable to all witnesses, whether parties or interested in the event of an action, is, that either a board, court, or jury must accept as true the positive, uncontradicted testimony of a credible witness, unless his testimony is inherently improbable, or rendered so by facts and circumstances disclosed at the hearing or trial. ... [N]either the trial court nor a jury may arbitrarily or capriciously disregard the testimony of a witness unimpeached by any of the modes known to the law, if such testimony does not exceed probability. ... Testimony which is inherently improbable may be disregarded ... but to warrant such action there must exist either a physical impossibility of the evidence being true, or its falsity must be apparent, without any resort to inferences or deductions. (Internal citations omitted).

Dinneen v. Finch, 100 Idaho 620, 626-27, 603 P.2d 575, 581-82 (1979) (citing *Pierstorff v. Gray's Auto Shop,* 58 Idaho 438, 447-48, 74 P.2d 171, 175 (1937)). If evidence is controverted, then it is up to the Commission to determine which testimony is more credible. The Industrial Commission is the arbitrator of conflicting evidence and if the Commission's determination is supported by substantial and competent, though conflicting, evidence, it will not be disturbed on appeal. *Calantine*, 103 Idaho 734 (citing *Hamby v. Simplot, Co.*, 94 Idaho 794, 498 P.2d 1267 (1972)).

III. ISSUE ANALYSIS

A. THE COMMISSION DID NOT COMMIT LEGAL ERROR OR ABUSE ITS DISCRETION BY DENYING CLAIMANT'S MOTION FOR PROTECTIVE ORDER ON FEBRUARY 23, 2010, CLAIMANT'S MOTION FOR RECONSIDERATION ON

DECEMBER 21, 2010, AND/OR CLAIMANT'S RENEWED MOTION FOR PROTECTIVE ORDER, MOTION FOR RECONSIDERATION AND SANCTIONS ON FEBRUARY 24, 2011

The Commission's full analysis that lead to their denial of these motions is set forth in detail in it's orders of September 7, 2010, *A.R., Vol. I, p. 77-85,* and December 21, 2010, *A.R., Vol. I, p. 135-140,*. and won't be rehashed here in detail. Defendants believe the Commissions orders should be affirmed by this Court. In a case heard after this matter, Coronel v Fleetwood Homes of Idaho, (IIC 2008-229252), the Commission reviewed its file with a further focus on the concerns that Claimant has raised here and under their similar legal analysis an order compelling discovery and requiring the Claimant to respond to an inquiry regarding his immigration status was upheld. See copy set forth as Exhibit A.

Claimant has put the cart before the horse in this appeal. Almost his whole argument here is centered around the Commission's previous holding in the Diaz matter as opposed to the Commission's power to make the Claimant comply with this discovery request. The holding of the Diaz case itself is not at issue here. Claimant has no impairment arising out of the 2008 case due to the causation opinion of the Commission. There was no impairment arising out of the 2004 injury. Diaz/PPD has never became an actual issue in this case. Disability in excess of impairment won't ever be an issue in this case unless this Court were to overturn the Commission's ruling on causation and the discovery sanction orders. A decision on whether a defendant can conduct a discovery investigation into a Claimant's legal right to work should be subordinate to an opinion on the Commission's causation decision in this case. Otherwise an opinion on the discovery issue, at least in this case, is no more than dicta. Without the condition for which claimant

seeks benefits being compensable claimant is not entitled to any award for physical impairment/disability. The only way impairment and or permanent disability become an issue in this case in front of the Industrial Commission is if this Court over turns the Industrial Commission's decision with regard to the causation issue.

The Commission has determined that a claimant's immigration status is a "relevant" factor in determining whether the claimant suffers from permanent disability as a result of his industrial injury. Accordingly, where permanent disability is an issue raised in a complaint, it is appropriate for the defendants in a case to conduct an investigation into the claimant's immigration status. *See Diaz v. Franklin Building Supply*, 2009 IIC 0652 (November 20, 2009). The narrow issue on appeal here is simply whether the Commission committed error in striking any allegation of PPD for not complying with the Commissions order to answer discovery questions regarding to Claimant's lawful ability to work/immigration status.

In his Opening Brief before this Court, Claimant contends, as he did previously before the Commission in his numerous duplicative motions below including his Motion for Protective Order, Motion for Reconsideration, and Renewed Motion for Protective Order/Reconsideration/Sanctions, that allowing a defendant to inquire into claimant's immigration status where permanent disability is a noticed issue: 1) conflicts with Ninth Circuit case law; 2) violates Claimant's Fifth Amendment rights; 3) is against legislative intent because Title 72 does not expressly exclude undocumented aliens from entitlement to PPD; 4) would cause Claimant to be subjected to a "secondary investigation;" 5) would unjustly enrich employers; 6) would lead to employers purposefully hiring employees that give the appearance of being undocumented; 7) places employers in danger of criminal

prosecution; 8) implicates underwriting practices thus leading to lawsuits against sureties by their policy holders; and, 9) has led to an incorrect conclusion that there is no labor market in Idaho for undocumented workers. *Claimant's Opening Brief, p. 3-34; A.R. Vol. I, p. 6-24, 42-48, 58-61, 66 -70, 71-72, 73-75, 86-96, 142-148.*

As indicated above, the Commission has held that a Claimant's legal ability to work is a necessary and "relevant" component of a request for PPD benefits. Claimant often cites to the *Diaz* dissent authored by Commissioner Thomas Baskin, for the proposition that *Diaz* was wrongly decided and the dissent somehow supports Claimant's position, i.e., "The facts to be weighed in considering whether or not to permit discovery of immigration status are complex. Many of those factors are lucidly discussed in the dissent in *Diaz*." *Claimant's Opening Brief, p. 11.* More important to the discovery sanction issue however is the fact that **each and every** Order issued by the Commission denying Claimant's motions contains the signature of Commissioner Baskin. *A.R. Vol. I, p. 50, 85, 140, 160; Vol. II, p. 278.* In fact, the September 7, 2010, Order, **signed by all three commissioners**, specifically states:

> The Commission's recent decision in *Diaz v. Franklin Building Supply*, IIC (November 20, 2009) illustrates the intersection of a claimant's legal status and the determination of the claimant's permanent partial disability (PPD) benefits. In *Diaz*, Claimant sought PPD benefits in excess of his physical impairment. Claimant openly acknowledged that he was present illegally in the U.S. and had no legal access to the Idaho or U.S. labor markets. The Commission ruled that Claimant was foreclosed from pursuing a claim for disability benefits in excess of permanent physical impairment due, in part, to the fact that he could not be legally employed in the United States. *Diaz* established, **at the very least**, that an injured worker's immigration status is relevant to the issue of disability as one of the several "non-medical factors" the Commission is required to consider in making the disability assessment.

A.R. Vol. I, p. 78-79 (emphasis added). Regarding Claimant's contention that compelling disclosure of his immigration status violates his Fifth Amendment right to remain silent, the Commission, quoting *Lester v. Salvino*, 141 Idaho 937, 940 (Idaho App. 2005), stated:

> Unlike a criminal defendant who may invoke the Fifth Amendment right to remain silent and force the state to prove its case, a civil litigant may be compelled, by the rules of discovery, to divulge unprivileged information that will aid his or her opponent. Rule 26(b)(1) permits parties to "obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action..."

A.R. Vol. I, p. 83. Therefore, as discussed above, the Commission did not commit legal error or abuse its discretion by denying Claimant's Motion for Protective Order, Motion for Reconsideration, and Renewed Motion for Protective Order/Reconsideration/Sanctions. Under the Commission's rulings a persons legal ability to work has bee determined to be a "relevant" non-medical factor and because it is "relevant" defendants are properly entitled to discovery responses on the topic. Therefore the holding in *Lester v. Salvino, supra,* is dispositive of this argument unless this Court were to decide, sua sponte, that legal ability to work is not a relevant factor as the Commission has determined.

B. THE COMMISSION DID NOT COMMIT LEGAL ERROR OR ABUSE ITS DISCRETION BY STRIKING CLAIMANT'S CLAIM FOR DISABILITY BENEFITS AS A SANCTION FOR CLAIMANT'S REFUSAL TO COMPLY WITH ITS SEPTEMBER 7, 2010, ORDER COMPELLING DISCOVERY

Under the Commission's broad rules of discovery,[3] Defendant's discovery requests regarding Claimant's legal status are permitted. Claimant repeatedly refused to respond to Defendant's interrogatory requests, claiming a purported entitlement to the privilege of the Fifth Amendment. Pursuant to JRP 16, the Commission has retained the "power to impose appropriate sanctions for any violation or abuse of its rules or procedures."

[3] See JRP 7(c) which provides that procedural matters relating to discovery, except sanctions, shall be controlled by the appropriate provisions of the Idaho Rules of Civil Procedure. *A.R. Vol. I, p. 83.*

Although reluctant to impose sanctions upon parties, the Commission tried other means to resolve the discovery disputes between the parties. However, after repeatedly urging Claimant to comply with Defendant's reasonable discovery requests, and repeatedly ordering Claimant to comply with Defendant's discovery requests on the matter, Claimant continued to refuse. *A. R. Vol. I, p. 83.* Thus, the Commission determined that an appropriate sanction for Claimant's refusal to comply with the Order Compelling Discovery was the dismissal of his claim for disability benefits from consideration. *A.R. Vol. I, p. 84-85.* This Court has previously upheld the Commission's imposition of sanctions, including termination of benefits, when a claimant refused to respond to questions about her past or present medical conditions at an IME. See, *Brewer v. LaCrosse Health and Rehab*, 138 Idaho 859, 71 P.3d 458 (2003). The Commission properly sanctioned Claimant for his refusal to comply with Defendants' relevant and reasonable discovery requests.

C. THE COMMISSION DID NOT ABUSE ITS DISCRETION BY ADMITTING AND CONSIDERING THE DEPOSITION TESTIMONY OF DR. TIMOTHY DOERR OVER CLAIMANT'S OBJECTIONS

Claimant next argues that the Commission's admission and consideration of the deposition testimony of Dr. Timothy Doerr over Claimant's objections is legal error or an abuse of discretion. In his Opening Brief, Claimant inexplicably states as follows:

> In the matter currently before the Court Defendants admitted in their answer dated January 22, 2009 **and in their answer dated the 27th of July 2011** that Claimant's condition for which benefits are claimed was partly caused by an accident arising out of and in the course of Claimant's employment and **failed to allege that any pre-existing condition might be the cause of Claimant's medical condition.**

Claimant's Opening Brief, p. 43. However, Defendants' Answer to Complaint No. 2008-004757, dated July 27, 2011, clearly identifies as an issue, "Whether Claimant's current condition is causally related to the industrial accident or is related to a **pre-existing** or

subsequent injury or condition." *A.R. Vol. II, p. 285* (emphasis added). Claimant alleges the defense of a pre-existing condition was a new theory, introduced by Dr. Doerr for the first time. Despite Claimant's protestations to the contrary, Claimant was obviously aware of the pre-existing issue, as evidenced not only by listing Dr. Doerr as a treating physcian on the July 27, 2011 Complaint, but by offering into evidence at hearing Claimant's Exhibit J, containing Dr. Doerr's chart note, **dated over three years prior to hearing,** specifically discussing Claimant's back pain as secondary to his degenerative changes at L5-S1!!! Claimant apparently believes that by admitting that he did not prepare for, anticipate, or hire experts to address the existence of the pre-existing degenerative condition, he has convinced this Court he had no advance knowledge of the issue. *Claimant's Opening Brief, p. 44; A.R. Vol. II, p. 283; Cl. Exh. J, p. 52.*

As discussed above, challenges to evidentiary rulings are reviewed under the abuse of discretion standard. *Perry v. Magic Valley Regional Medical Center*, 134 Idaho 46, 50, 995 P.2d 816, 820 (2000) (*citing Kozlowski v. Rush*, 121 Idaho 825, 827, 828 P.2d 854, 856 (1992)). In its Findings of Fact, Conclusions of Law, and Order, (hereinafter, the "Decision"), the Commission overruled all objections posed during depositions. *A.R. Vol. II, p. 312.* Further, the Commission specifically, and in minute detail, discussed its rationale for overruling Claimant's objection posed during Dr. Doerr's deposition, which objection Claimant then renewed in his Closing Brief. Claimant objected to Dr. Doerr's deposition testimony, arguing that the opinions expressed therein were beyond the facts known and opinions held by Dr. Doerr as revealed in the course of discovery. Claimant also argued that Dr. Doerr's testimony should be excluded because Dr. Doerr testified without giving due consideration to Claimant's condition and medical records after September 16, 2008.

Importantly, the Commission indicated its belief that to properly address Claimant's objection it was necessary to provide a seven-page detailed review and examination of the procedural history of the case *Id., p. 312-319* (reviewing the procedural history of the claim).

Included in the Commission's discussion of its rationale for overruling Claimant's objection to the admission of Dr. Doerr's deposition testimony, was the following statement:

> On July 28, 2011, at hearing, Claimant objected to inclusion of Defendants' Exhibit L, an independent medical examination (IME) report by Dr. Richard Silver. Though Defendants ultimately withdrew Exhibit L for other reasons, **it is worth examining Claimant's objection at length, as it is essentially identical to his current objection regarding Dr. Doerr's testimony.**

A.R., Vol. II, p. 315. At hearing, Claimant objected to Defense Exhibit L (the Silver IME report), as well as Defendants' Notice of Deposition of Dr. Silver, arguing that Defendants had failed to comply with I.R.C.P. Rule 26 for disclosure of expert witnesses. Claimant's objections were overruled after Claimant's counsel admitted Defendants had previously identified Dr. Silver as a potential expert witness and had also provided a copy of Dr. Silver's report during the discovery process as early as April, 2009. *Id., p. 316-318.*

Defendants ultimately withdrew Dr. Silver's report because he died prior to hearing and could not provide post-hearing deposition testimony. *Id.* However, on August 3, 2011, when Defendants filed an amended notice to take Dr. Doerr's deposition, Claimant, relying on I.R.E. 705 and I.R.C.P. 26, raised the same objection previously raised and overruled at hearing as to Dr. Silver. Claimant contended that any expert opinion stated by Dr. Doerr would be beyond the scope of discovery, because the nature of the opinion was not detailed in discovery. The Commission dealt with this objection by discussing the

holding in *Watson v. Joslin Millwork*, 149 Idaho 850, 243 P.3d 666 (2010). Essentially, this Court has ruled that, in workers' compensation cases, it is permissible for experts to provide greater detail and explanation in their testimony than was previously provided in reports or medical records, and even to state opinions that were not explicitly stated before, as long as the conclusions are based on evidence in the record and may be reasonably inferred from earlier records or reports.

The Commission found that Claimant's reliance on I.R.E. 705 was misplaced, as strict adherence to the rules of evidence *is not* required in Industrial Commission proceedings. *Hagler v. Micron Technology*, 118 Idaho 596, 598, 798 P.2d 55, 57 (1990)(emphasis in original). The Commission continued the analysis, stating as follows:

> Likewise, the Idaho Rules of Civil Procedure do not normally apply in Commission cases. *Page v. McCain Foods*, 145 Idaho 302, 311, 179 P.3d 265, 274 (2008). Rather, the Commission's Judicial Rules of Practice and Procedure govern worker's compensation cases. IDAPA 17.01.01.021. *See also* Idaho Code 72-508. However, JRP 7(C) states that procedural matters relating to discovery shall be "controlled by the appropriate provisions of the Idaho Rules of Civil Procedure." Rule 26 is a discovery provision and therefore applies.

A.R., Vol II, p. 318. Claimant argues that failure to meet the requirements of Rule 26 typically results in the exclusion of the proffered evidence. Claimant cites *White v. Mock*, 140 Idaho 882, 888 (2004), in support of his argument, however the facts of that case have no similarity to the instant case. *White v. Mock* involves a contract dispute wherein the Idaho Supreme Court determined the plaintiff was not entitled to call defendant vendors' expert witness on existence and types of mold (who vendors had identified as a rebuttal witness) as a witness to establish Plaintiff's prima facie case, where before trial White had merely made a general "reservation of rights" to call vendors' witnesses at trial.

An evidentiary ruling, such as whether to exclude undisclosed expert testimony, is

committed to the sound discretion of the trial court. *Duspiva v. Fillmore*, 293 P.3d 651 (2013) (citing *Schmechel v. Dille*, 148 Idaho 176, 180, 219 P.3d 1192, 1196 (2009). When reviewing a lower court or agency's discretionary decision, this Court must conduct a three-part inquiry to determine whether the lower court or agency abused its discretion. Acknowledging the *Magee* inquiry, the Commission stated as follows:

> Thus, Rule 26 "unambiguously imposes a continuing duty to supplement responses to discovery with respect to the substance and subject matter of an expert's testimony." However, the decision whether to exclude undisclosed expert testimony is "committed to the sound discretion of the trial court," or here, the Commission. In considering how to exercise its discretion, the Commission should act within the "outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available. The decision whether to exclude should be reached by an exercise of reason."

A.R. Vol. II, p. 320-321 (internal citations omitted). The Commission determined that Defendants had not violated Rule 26 by failing to disclose Dr. Doerr's opinion, as Dr. Doerr, like Dr. Silver, ***was*** disclosed by Defendants in April, 2009, as a potential witness who might provide opinion testimony. The Commission then referred to Commissioner Baskin's statement at hearing that Defendants had complied with the spirit of Rule 26, finding that compliance applied to their disclosures regarding Dr. Doerr as well as to the disclosures regarding Dr. Silver. Further, the Commission found that the opinions to which Dr. Doerr ultimately testified were essentially the same as the opinions set forth in his records, previously disclosed to Claimant.

As indicated above, the Commission next considered this Court's application of Rule 26 in workers' compensation cases, essentially that it is permissible for experts to provide greater detail and explanation in their testimony than was previously provided in reports or medical records, and even to state opinions that were not explicitly stated

before, as long as the conclusions are based on evidence in the record and may be reasonably inferred form earlier records or reports. *Watson v. Joslin Millwork*, 149 Idaho 850, 857-858, 243 P.3d 666, 673-674 (2010).

By admitting Dr. Doerr's testimony, the Commission did not abuse its discretion because it (1) correctly perceived the issue as discretionary, (2) acted within the bounds of discretion and applied the correct legal standards, and (3) reached the decision through an exercise of reason. *Magee v. Thompson Creek Min. Co.,* 152 Idaho 196, 200, 268 P.3d 464, 468 (2012) (*citing West Wood Invs., Inc., v. Acord*, 141 Idaho 75, 82, 106 P.3d 401, 408 (2005)).

D. THE COMMISSION'S FACTUAL DETERMINATION THAT CLAIMANT FAILED TO PROVE THE CONDITION FOR WHICH HE CLAIMED BENEFITS WAS CAUSED EITHER BY HIS 2004 OR HIS 2008 INDUSTRIAL ACCIDENTAND THEREFORE WAS NOT ENTITLED TO ADDITIONAL BENEFITS IS SUPPORTED BY SUBSTANTIAL AND COMPETENT EVIDENCE

Claimant **must** establish a probable, not merely possible, connection between cause and effect to support his contention. This, as clearly articulated by the Commission, Claimant has failed to do.

Treating physician for the 2004 accident, Dr. Johnston, opined that Claimant's back pain was mostly related to degenerative changes that pre-existed the 2004 accident and deemed Claimant MMI without any permanent impairment attributed to this accident in June, 2004. Claimant testified that he returned to his time of injury position and worked full time until his next accident on January 28, 2008. Thus, there is substantial and competent evidence of record to support Dr. Johnston's conclusion that Claimant attained medical stability in June, 2004. Claimant relies on the medical records of Dr. Thompson to argue his causation case. The Commission clearly articulated its reasoning for declining to

agree, stating that her medical records contained conclusory statements insufficient to draw clear lines supported by well-reasoned analysis to connect Claimant's accidents to his disc herniation and his disc herniation to his pain, where the record contains conflicting evidence.

Following his second accident on January 28, 2008, Claimant was treated first by Dr. Verska. Dr. Verska obtained an MRI of Claimant's lumbar spine in February, 2008, which showed no change from the 2004 MRI. These two diagnostic reports are substantial and competent evidence that Claimant's 2008 accident did not cause or worsen his pre-existing herniated disc.

Dr. Doerr treated Claimant from April to September 8, 2008. When physical therapy and epidural steroid injections did not improve Claimant's symptoms, Dr. Doerr obtained two discograms, the first of which was inconclusive and the second, by Dr. Binegar, which raised significant concerns about the reliability of Claimant's presentation and his nonorganic symptoms. A third MRI obtained in October, 2008, showed no significant change from either the 2004 or February, 2008 MRI. Based upon Claimant's behavior during the discograms, his unreliable presentations and nonorganic symptoms (mentioned by Dr. Doerr, Dr. Rogers, Dr. Binegar and Dr. Thompson) as well as Claimant's wholly unsupported hearing testimony that three physicians had recommended surgery, the Commission determined that Claimant was not completely credible. Because the only evidence that Claimant's condition worsened after his 2008 accident was Claimant's subjective complaints, the Commission determined that Claimant failed to prove that the condition for which he claimed benefits was caused either by his 2004 or 2008 industrial accidents. The Commission properly determined that because Claimant

failed to meet his burden of proving causation, he was unable to prove entitlement to any additional benefits. "The Industrial Commission, as the factfinder, is free to determine the weight to be given to the testimony of a medical expert." *Eacret v. Clearwater Forest Industries*, 136 Idaho 733, 737, 40 P.3d 91, 95 (2002).

E. THE COMMISSION DID NOT COMMIT LEGAL ERROR OR ABUSE ITS DISCRETION BY ISSUING ITS JULY 8, 2013 ORDER REGARDING CLAIMANT'S REQUEST TO AUGMENT THE RECORD

Claimant filed his Objection and Motion to Augment the Record on June 18, 2013, requesting numerous items be included in the agency record in addition to those automatically included under I.A.R. 28. *A.R., Vol., II, p. 354-57.* In his Opening Brief, Claimant contends that, while "the Commission responded by augmenting the record to include the majority of Claimant's requests, excluding transcripts and audio of the telephonic hearings stating they were not in their possession, the Commission's Order Regarding Claimant's Request to Augment the Record makes no mention of the July 28th hearing request for audio, etc." *Claimant's Opening Brief, p. 49.* Claimant asserts, citing *Small v. Jacklin Seed Company,* 109 Idaho 541, 544 (1985), that this requires the case to be remanded back to the Commission for reconsideration due to "inadequacies of the record." *Id.*

Despite Claimant's assertions to the contrary, an accurate reading of the Commission's July 8, 2013 Order, supports the conclusion that **all** of Claimant's requests were either granted, or were otherwise addressed by the Order. Specifically, the Order states in pertinent part, as follows:

> The [July 28, 2011] hearing transcript and exhibits, whether admitted or not, will be lodged with the Court, as required by the Idaho Appellate Rules. There is no need for duplication in the agency record. There are no

> transcripts or audio recordings for the telephone conferences that occurred on July 27, 2011, December 21, 2010, and August 12, 2010. Any motions, orders or other documents related to those telephone conference are part of the Commission's legal file and have already been included in the agency record.... The remaining items to which Claimant refers either do not exist or are not in the Commission's possession.

A.R., Vol. II, p. 359-360. The transcript of the hearing held on July 28, 2011 was automatically lodged with the Court as required by the Idaho Appellate Rules. There is no basis for Claimant's contention that the Commission committed legal error or abused its discretion by "denying the items requested in Claimant's objection and motion to augment the record filed on the 18th of June, 2013." I.A.R. 28; *A.R. Vol. I, p. i.*

Under the Idaho Appellate Rules, it is questionable whether Claimant is even entitled to have "audio" of hearings included in the record.[4] The sole reference to "audio"

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[4] IAR 28 (a) provides that the parties are responsible for designating the **documents** which will compromise the clerk's record on appeal. The standard record described in subsection (b) is not designed to include many items i.e., motions for summary judgment, affidavits, jury instructions, etc., which may be pertinent to the appeal in a specific case. Parties are encouraged to designate a clerk's or agency's record **more limited** than the standard record.

IAR 28 (b)(3) The clerk's or agency's record shall automatically include the following **pleadings and documents** in administrative proceedings:

A. Any order sealing all or any portion of the record.
B. Any original or amended complaint, petition, application or other initial pleading.
C. Any answer or response thereto.
D. All documents relating to an application or petition to intervene.
E. Any protest or other oppositions filed by a party.
F. A certificate listing all exhibits offered, whether or not admitted.
G. The findings of fact, conclusions of law, or if none, any memorandum decision entered by the agency.
H. The final decision, order or award.
I. Petitions for rehearing or reconsiderations or orders thereon.
J. Notice of appeal and any notice of cross-appeal.
K. Any request for additional reporters' transcripts or agency's record.
L. Table of contents and index.

IAR 28 (c) Additional **documents**. The clerk's or agency's record shall also include all additional **documents** requested by any party in the notice of appeal, notice of cross-appeal and requests for additional **documents** in the record. Any party may request any **written document** filed or lodged with the district court or agency to be included in the clerk's or agency's record including, but not limited to written requested jury instructions, written jury instructions given by the court, depositions, briefs, statements or affidavits considered by the court or administrative agency in the trial of the action or proceedings, or considered on any motion made therein, and memorandum opinions or decisions of a court or administrative agency.

IAR 28 (d) Preparation of record. The clerk shall prepare the record on **paper** by making clearly and distinctly legible photocopies or other reproductions of **all documents** included in the record. The clerk shall type or have typed any document which cannot be reproduced in a distinctly legible form.

and "recordings" resides in I.A.R. 31(a), regarding "audio and audio-visual recordings offered or played during the proceedings.[5] The Commission did not have audio recordings of the telephone conferences but all of their orders from such conferences are in the record. *A.R., Vol. II, p. 359.*

F. CLAIMANT IS NOT ENTITLED TO ATTORNEY FEES

Regardless of the outcome of the issue on appeal, Defendants should not be ordered to pay attorney fees. I.C. §72-804 fees are only payable when the Commission, or any Court hearing a workers compensation proceeding, determines that the employer or surety contested the claim for compensation "without reasonable grounds." Claimant has failed to show that Defendants unreasonably denied or delayed payment of attorney fees. Further, Defendants clearly have reasonable grounds to ask the Court to affirm the Industrial Commission's ruling that Claimant failed to meet his burden of proving that the condition for which he claimed benefits was caused either by his 2004 or 2008 industrial accident.

G. DEFENDANTS' REQUEST FOR AN AWARD OF COSTS ON APPEAL UNDER I.A.R. 41 SHOULD BE GRANTED

Claimant has characterized the issues to be determined by this Court as being issues of law. *Claimant's Opening Brief, p. 2.* However, the seminal issue here is actually one of fact, that is, whether there was substantial, competent evidence to support the Commission's finding. As previously articulated by this Court:

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[5] IAR 31(a) Lodging with Supreme Court. The clerk of the district court or administrative agency shall lodge all of the following exhibits, **recordings** and documents with the Supreme Court. (1) Copies of all requested documents, charts and pictures offered or admitted as exhibits in a trial or hearing in a civil case... (2) All records and transcripts filed with the district court or administrative agency (3) All transcripts from the magistrate's division of the district court (4) **All audio and audio-visual recordings offered or played during the proceedings.**

> ... [C]osts are properly awarded when an appeal asks this Court to do nothing more than reweigh the evidence submitted to the Commission.

Duncan v. Navajo Trucking, 134 Idaho 202, 204; 998 P.2d 1115, 1117 (2000) (citing *Baker v. Louisiana Pacific Corporation*, 123 Idaho 799, 803, 853 P.2d 544, 547 (1993).

CONCLUSION

As previously set forth, Defendants respectfully pray that this Court not disturb the Commission's findings of fact regarding the weight of the medical evidence because the Commission's findings regards medical causation are not clearly erroneous and are supported by substantial and competent evidence. Additionally the Court should find that the Commission did not abuse its discretion in the rendering of sanctions for not complying with appropriate discovery orders.

Further, Defendants request this Court award costs on appeal to Defendants.

Respectfully submitted this 15th day of November, 2013.

LAW OFFICES OF KENT W. DAY

By: _____
Kent W. Day
Attorney for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of November, 2013, I caused a copy of the foregoing **RESPONSIVE BRIEF OF DEFENDANTS/RESPONDENTS** to be served by first class mail, postage prepaid, upon the following:

Richard L. Hammond
Attorney at Law
811 East Chicago Street
Caldwell, ID 83605

Kent W. Day

2011 WL 4674786 (Idaho Ind.Com.)

Industrial Commission
State of Idaho

*1 RUBEN CORONEL, CLAIMANT
v.
FLEETWOOD HOMES OF IDAHO, EMPLOYER
AND
INSURANCE COMPANY OF STATE OF PENNSYLVANIA, SURETY, DEFENDANTS

IC
2008-029252

September 23, 2011

ORDER DENYING MOTION FOR RECONSIDERATION

On April 5, 2011, Claimant filed a Motion for Reconsideration, requesting reconsideration of Referee Just's Order filed April 4, 2011. Claimant requests a hearing and the opportunity to provide oral argument to the Commissioners on the matter. Defendants filed a response objecting to Claimant's request for reconsideration on April 27, 2011. On July 19, 2011, Claimant filed another supplemental memorandum in support of his request for reconsideration. The Commission did not consider this additional late filing.

In this case, Claimant has declined to provide Defendants with a response to discovery intended to ascertain Claimant's immigration status. The Referee's Order compelled Claimant to respond fully to Defendants' discovery requests. The Referee warned Claimant that the failure to comply with the discovery requests could result in sanctions, including the dismissal of Claimant's claim for disability in excess of impairment (hereinafter "disability" or "PPD").

Claimant submitted a cogent and articulate brief with secondary sources for the Commission to consider. Claimant argues that the Commission should grant a protective order to prevent Defendants from discovering information concerning the Claimant's citizenship or immigration status. Claimant's most persuasive argument is that compelling Claimant to disclose information relevant to his immigration status over his assertion of his privilege against self-incrimination under the Fifth Amendment violates his constitutional rights, and that public policy warrants granting his motion for a protective order. Claimant also requests a hearing before the Commissioners for oral argument.

Defendants argue that the Commission should not grant Claimant's requested protective order, as Claimant's immigration status is relevant to consideration of Claimant's access to the labor market for calculation of his entitlement to

Ex A-1

PPD benefits. Further, Claimant's claim for PPD is voluntarily made. Defendants note that had Claimant simply filed a claim for medical benefits or for physical impairment, Claimant's immigration status would not be relevant. Defendants argue that they have not failed to timely raise illegality as an affirmative defense, because Claimant bears the burden of proof concerning his immigration status. That is, Defendants argue that the burden of proof does not switch from Claimant to Defendants—Claimant must prove lost earning capacity by loss of access to the labor market, and Claimant must answer their reasonable discovery requests. Defendants argue that they have only requested information that has bearing on whether Claimant is lawfully present and whether Claimant may lawfully work in the United States. Defendants contend that nothing in their requests for information asks Claimant to identify information that would demonstrate fraud or other criminal activity.

THE COMMISSION HAS AUTHORITY TO CONSIDER THE MOTION

***2** As a preliminary matter, Claimant has challenged an interlocutory order from a Commission referee. Under Idaho Code § 72-506(2), an order made by a referee is not an order of the Commission unless it is "approved and confirmed" by the Commission. This statute establishes the Commission's authority to review the orders of a referee; otherwise, the Commission would not be able to approve and confirm such orders. The process by which a party may seek Commission review of a referee's order is not expressly outlined by statute or rule. Review may be sought by means of a motion for reconsideration filed after the Commission has issued its decision in the case. *See Wheaton v. ISIF*, 129 Idaho 538, 928 P.2d 42 (1996) and *Simpson v. Louisiana-Pacific Corp.*, 134 Idaho 209, 998 P.2d 1122 (2000). Generally, however, the Commission prefers that challenges to interlocutory orders of a referee be made in the parties' post-hearing briefs, before the final decision has been issued.

There are some circumstances that justify earlier consideration of a challenge to a referee's order. These circumstances are similar to those that would compel the Idaho Supreme Court to consider an interlocutory appeal. Pre-hearing review is appropriate where the challenge "involves a controlling question of law as to which there is substantial grounds for difference of opinion," and when immediate consideration of the challenge "may materially advance the orderly resolution of the litigation."*See Kindred v. Amalgamated Sugar Co.*, 118 Idaho 147, 149, 795 P.2d 309, 311 (1990).

Such circumstances exist in this case. Claimant's motion raises a significant question about the propriety of Defendants' requested discovery. Furthermore, the Commission's decision to confirm or overturn the Referee's Order could have a substantial impact on the type of evidence presented at hearing. Thus, Claimant's motion is best addressed before the hearing occurs. The Commission has authority to consider Claimant's motion under Idaho Code § 72-506(2) and J.R.P. 3(E)(1), which permits an "application to the Commission for an order."The Commission will now discuss the arguments from the parties.

DISCUSSION

In another recent case, the Commission has found that the refusal to disclose legal status in Claimant's workers' compensation proceeding for permanent partial disability (PPD) benefits may result in the Commission striking PPD as a hearing issue, as a sanction against Claimant for refusing to comply with a reasonable discovery request. Claimant criticizes our *Serrano* order which held that claimant was not entitled to additional protections relating

to disclosure of his legal status, because deportation is a civil matter. *See, Serrano v. Four Seasons Framing, Inc.*, 2004 IIC 501845. Claimant's argument is that the Commission neglected to address the additional criminal prosecution risks he faces beyond civil deportation, i.e. criminal prosecution for false use of a Social Security number, identity fraud, etc. Therefore, Claimant believes that the hazard of self-incrimination is real and appreciable.

***3** Defendants argue that the requests for information do not give rise to the risk of criminal prosecution against the Claimant. Defendants have produced the following interrogatories to show that their questions are narrowly tailored to discover information about Claimant's ability to work in the United States. Defendants argue that their requests are appropriately centered on whether Claimant is lawfully present and whether Claimant may lawfully work in the United States.

As a preliminary matter, the Commission is not persuaded that Defendants have waived an affirmative defense regarding Claimant's PPD benefits. Claimant has the burden of proving his entitlement to PPD benefits in excess of impairment. The Commission does not require Defendants to plead the immigration status of Claimant in its original answer.

In order to have compensable disability under the workers' compensation laws, an employee must have a work-related injury that has caused him to "suffer a decrease in 'wage-earning capacity' as that capacity is affected by the pertinent medical and non-medical factors."*McCage v. JoAnn Stores, Inc.*, 145 Idaho 91, 97, 175 P. 3d 780, 786 (2007). Whether an employee's wage-earning capacity is permanently diminished and the extent of such diminishment are **determined** by an analysis of several factors, including the impact of the employee's injury on the employee's ability to procure and hold employment and ability to compete in an open **labor market** within a reasonable geographical area. Idaho Code § 72-430; *Davaz v. Priest River Glass Co.*, 125 Idaho 33, 870 P. 2d 1292 (1994).

In *Diaz v. Franklin Building Supply*, **IC** 2006-50799 (2009), Diaz sought PPD benefits in excess of his physical impairment. Diaz openly acknowledged that he was present illegally in the U.S. and had no legal access to the Idaho or U.S. **labor markets**. The Commission ruled that Diaz was foreclosed from pursuing a claim for disability benefits in excess of permanent partial impairment due, in part, to the fact that he could not be legally employed in the United States. As explained by the Commission's decision in *Otero v. Briggs Roofing Company*, IC 2007-16876 (filed August 12, 2011), Diaz's illegal status *was a factor that entirely eclipsed his injury-related impairment*. Thus, Diaz sustained no disability in excess of impairment. Second, when conducting a disability analysis, the Commission would not take into account the potential for illegal conduct.

> At no point in the decision did the Commission hold that Mr. Diaz was not entitled to permanent disability benefits simply because he was an undocumented worker. Rather, Mr. Diaz was not entitled to permanent disability benefits because another factor, which happened to be illegal working status, "overshadowed and essentially rendered moot" his impairment.
>
> *Otero*, supra, at 16.

Every disability analysis requires consideration of an injured worker's relevant non-medical factors, and these factors have an important effect on the calculation of disability in excess of impairment. The Commission finds it inappropriate to ignore evidence of Claimant's immigration status, or any other non-medical factors influencing Claimant's capacity to work, for that matter, relevant to evaluating Claimant's disability in excess of impairment.

***4** As stated in Rule 7 of the Judicial Rules of Practice and Procedure under the Idaho Workers' Compensation Law (JRP), "Procedural matters relating to discovery, except sanctions, shall be controlled by the appropriate provisions of the Idaho Rules of Civil Procedure."Rule 26(b)(1) of the Idaho Rules of Civil Procedure allows parties to obtain

discovery regarding any matter, not privileged, which is *relevant* to the subject matter involved in the pending action.

The Fifth Amendment, in relevant part, states that "no person shall ... be compelled in any criminal case to be a witness against himself."The central standard for the privilege's application has been whether the claimant is confronted by substantial and 'real,' and not merely trifling or imaginary, hazards of incrimination." Marchetti v. U.S., 390 U.S. 39, 53,*see*Hill v. Department of Employment, 108 Idaho 583 (1985). It has long been held that this prohibition not only permits a person to refuse to testify against himself at a criminal trial in which he is a defendant, but also "privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings."*Lefkowitz v. Turley*, 414 U.S. 70, 77, 94 S.Ct. 316, 322, 38 L.Ed.2d 274, 281 (1973).*Minnesota v. Murphy*, 465 U.S. 420, 426, 104 S.Ct. 1136, 1141, 79 L.Ed.2d 409, 418 (1984).

> "In determining whether such a real and appreciable danger of incrimination exists, a trial judge must examine the 'implications of the question[s] in the setting in which [they are] asked ....' [Citations.] He "'[m]ust be governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence.'[Citations.] If the trial judge decides from this examination of the questions, their setting, and the peculiarities of the case, that no threat of self-incrimination exists, it then becomes incumbent 'upon the defendant to show that answers to [the questions] might criminate him.'[Citations.] This does not mean that the defendant must confess the crime he has sought to conceal by asserting the privilege. The law does not require him "'to prove guilt to avoid admitting it."' [Citations.] But neither does the law permit the defendant to be the final arbiter of his own assertion's validity. 'The witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself-his say-so does not of itself establish the hazard of incrimination. It is for the court to decide whether his silence is justified ....' [Citations.]"
> Idaho State Tax Commission v. Peterson, 107 Idaho 260, 262, 688 P.2d 1165, 1167 (1984).

The Commission will address each interrogatory and request for production of documents.

INTERROGATORY NO. 1: Please identify whether you are a citizen of the United States, and if not, whether you entered the United States legally.

***5** As to the first aspect of Defendants' interrogatory, "[p]lease identify whether you are a citizen of the United States ...," the Commission has found that Claimant's immigration status is relevant to the determination of his request for permanent partial disability (PPD) benefits. Claimant's disclosure of his citizenship is relevant, but not without risks. While the Fifth Amendment protects individuals from being compelled to give a statement that may be used against them, the Fifth Amendment does not apply in circumstances where a claimant wishes to conceal her legal status to avoid deportation. *See, United States v. Balsys*, 542 U.S. 666, 671 (Balsys agrees that the risk that his testimony might subject him to deportation is not a sufficient ground for asserting the privilege, given the civil character of a deportation proceeding); *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1043-44 (1984); *People v. Bolivar*, 643 N.Y.S.2d 205 (1996). In fact, a claimant's silence on his immigration status does not protect him in an immigration proceeding.

> Silence is often evidence of the most persuasive character ... [T]here is no rule of law which prohibits officers charged with the administration of the immigration law from drawing an inference from the silence of one who is called upon to speak .... A person arrested on the preliminary warrant is not protected by a presumption of citizenship comparable to the presumption of innocence in a criminal case. There is no provision which forbids drawing an adverse inference from the fact of standing mute.

INS v. Lopez-Mendoz, 468 U.S. at 1043-44 (*quoting United States es rel. Bilokumsky v. Tod*, 263 U.S. at 153-54.)

Ex A-9

The Commission does not prosecute criminal actions, and we are primarily concerned with Claimant's workers' compensation case—particularly the Claimant's relevant medical and non-medical factors for calculation of the PPD benefits. The Commission is not the appropriate place to address long-standing federal and state laws about undocumented workers or immigration, although Claimant has certainly presented interesting policy concerns. The Commission has taken into account the peculiarities of this workers' compensation case and weighed the threat of self-incrimination. After reviewing the scenarios that Claimant has set forth, the Commission still finds that Claimant is not sufficiently implicated in any crimes by stating his immigration status as to warrant invoking the Fifth Amendment privilege, particularly taking into account the setting in which they are asked.

As discussed above, Claimant's legal ability to work is a necessary and relevant component of his request for PPD benefits. Claimant has not adduced sufficient evidence or case law to show that deportation is a criminal proceeding entitled to the protections of the Fifth Amendment rather than a civil proceeding. Again, there is no presumption of citizenship. Claimant has not shown any specific hazard of incrimination or Fifth Amendment protection that would prevent the disclosure of his legal status to Defendants in this workers' compensation proceeding. Claimant may offer a simple response to the question, *without* commentary on ancillary matters. The Commission finds that this part of Defendants' first interrogatory is appropriate and relevant.

***6** The Commission finds the second part of the interrogatory questionable. Defendants ask whether "Claimant entered the United States legally."The Commission does not need this information to determine Claimant's entitlement to disability benefits. The Commission is concerned about how this discovery request might expose Claimant to risks related to criminal matters, which are not germane to the workers' compensation proceeding. In an abundance of caution, the Commission will strike the second part of Defendant's interrogatory as follows:

INTERROGATORY NO. 1: Please identify whether you are a citizen of the United States, <<-and if not, whether you entered the United States legally.->>

INTERROGATORY NO. 2: Please identify and describe in detail whether you are legally entitled to work in the United States, including whether you have a work permit and the dates such work permit was in place.

Defendants' interrogatory is meant to ascertain whether Claimant has access to the labor market in the future, which is a relevant inquiry, given the benefits Claimant is seeking. The question is whether the second interrogatory presents a substantial and 'real' risk of incrimination.

Hypothetically, a claimant might be concerned that this question exposes him or her to prosecution for using a fraudulent work permit or fraudulent use of a Social Security number. However, Defendants' second interrogatory is broadly worded and intended to discern whether Claimant can access the labor market *in the future*, as needed to calculate the disability benefits to which Claimant may be entitled. The Commission does not find that this question forces Claimant to produce falsified documents or evidence of fraud.

Defendants' second interrogatory is narrowly tailored to Claimant's ability to work in the United States, and does not inappropriately delve into the elements characteristic of a criminal proceeding. Claimant may answer this interrogatory about his future access to the labor market without detailing or addressing past documents or actions. Therefore, the Commission will not alter Defendants' Interrogatory No. 2.

Defendants' last request for documents supporting Claimant's legal ability to work in the United States is included below:

REQUEST FOR PRODUCTION NO. 1: Please provide any documents demonstrating your ability to legally work in the United States.

Again, Claimant should produce any documents showing that he may legally access the labor market. Defendants' request does not assume that Claimant produced fraudulent documents, or require that Claimant produce evidence of fraudulent or criminal actions. Claimant may produce appropriate documents, or he may decline the pursuit of PPD benefits which are based, in part, on Claimant's future access to the labor market.

In defending the claim for disability benefits, Defendants are entitled to conduct discovery necessary to assess how Claimant's permanent partial impairment, combined with other non-medical factors, may have influenced his loss of earning capacity. Claimant's immigration status is a relevant factor, among many, that the Commission considers in evaluating Claimant's permanent disability. Claimant is aware, based on Commission precedent, that he will need to divulge his immigration status, if he wishes a Commission decision on his permanent partial disability. Defendants' request for the production of documents is appropriate, and does not violate Claimant's Fifth Amendment rights.

*7 Even under Commissioner Baskin's dissent in *Diaz v. Franklin Building Supply*, **IC** 2006-50799 (2009), Claimant's immigration status and his legal entitlement to hold employment in the United States matter, and would need to be disclosed. The *Diaz* dissent argued that the Commission should examine the **labor market** for undocumented workers in this state for the calculation of permanent partial disability, rather than find a claimant ineligible for permanent partial disability benefits due to the claimant's status as an undocumented worker.

The Commission has reviewed the file with a focus on the concerns that Claimant has raised and we maintain that the legal analysis supports the order compelling discovery. Although Claimant disagrees, the Commission finds that Claimant has not presented persuasive argument to disturb the order compelling discovery.

ORDER

Based upon the foregoing reasons, Claimant's Motion is **DENIED**.

I

Defendants' first interrogatory is changed as follows:

INTERROGATORY NO. 1: Please identify whether you are a citizen of the United States, <<-and if not, whether you entered the United States legally.->>

Defendants' second interrogatory and Defendants' first request for production of documents are appropriate, as they concern Claimant's ability to access the labor market, and do not present a real and substantial risk to Claimant.

II

Claimant is hereby **ORDERED** to comply with Defendants' reasonable discovery requests.

III

Claimant's request for oral argument and a hearing is **DENIED**.

IT IS SO ORDERED.

DATED this 23rd day of September, 2011.

INDUSTRIAL COMMISSION

Thomas E. Limbaugh
Chairman

Thomas P. Baskin
Commissioner

R.D. Maynard
Commissioner

ERRATUM ON ORDER DENYING MOTION FOR RECONSIDERATION

On September 23, 2011, the Order Denying Motion for Reconsideration was filed by the Commission in the above-entitled case. The following typographical errors should be changed as follows:

On the Order Denying Motion for Reconsideration, Page 1, the **IC** number, "**IC** 2008-029252" should be changed to read "**IC** 2008-026353."

DATED this 30thday of September, 2011.

INDUSTRIAL COMMISSION

Thomas E. Limbaugh
Chairman

Thomas P. Baskin
Commissioner

R.D. Maynard
Commissioner

2011 WL 4674786 (Idaho Ind.Com.)

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Ex A-7